Before the
Federal Communications Commission
Washington DC 20054

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity	)	
in Video Programming Distribution:	)	
Section 628(c)(5) of the Communications	)	
Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

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SUMMARY

The Broadband Service Providers Association ("BSPA") is an organization of a new breed of last-mile service providers – companies that are building new, facilities-based, advanced last mile broadband networks for the delivery of compelling bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country.[1] As such, BSPA's members compete directly with cable operators and other multichannel video programming distributors ("MVPDs"), as well as incumbent and competitive local exchange carriers, and Internet service providers.

BSPA's mission is to promote and support the development of a competitive, facilities-based, broadband industry, which will expand consumer choice and increase infrastructure investment in communities around the country. With over 22 million households already under franchise, over one million current subscribers, and more than 29,000 miles of constructed broadband network, BSPA members represent one of the best opportunities to satisfy expanding demand for competitive residential broadband services.

This proceeding is of significant importance to BSPA members. The provision of high quality content is the cornerstone to its members' bundled, multichannel video offerings. Without such content, any multichannel provider, broadband or otherwise, would be unable to compete.

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[1] The founding members of BSPA are Altrio Communications, Carolina Broadband, ClearSource, Everest/UtiliCorp United, Gemini Networks, Grande Communications, Knology, RCN Corp., Astound Broadband, Starpower Communications, LLC, Utilicom Networks LLC (d/b/a Sigecom and TOTALink), and Wide Open West. These members have operations in numerous states, including Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, D.C., and Wisconsin. Contact information for each of the founding members is listed in Attachment A, hereto.

The deployment of competitive broadband infrastructure has become the central communications policy objective today, and has emerged as the fundamental priority of the Commission. At the core of the broadband debate is the provision of facilities-based competition through multiple broadband platforms, which will provide the most substantial benefits to consumers.

The deployment of new, high-capacity facilities by competitive broadband providers allows for the provision of next-generation, advanced services, which cannot be provided on existing legacy networks. In addition, direct, head-to-head competition from advanced networks leads to significant competitive responses from incumbent providers. In addition to decreasing prices, increasing channel offerings, improving customer service, and offering new, innovative services, incumbent providers also respond by upgrading and investing in their own networks to provide advanced services that are competitive with those of the new entrant. Competitive entry therefore brings a second key benefit – the substantial investment dollars associated with the construction of multiple, competing networks.

Broadband deployment and facilities-based competition, however, have yet to reach ubiquitous levels. One factor that continues to slow competitive entry is ongoing impediments to acquiring programming content that subscribers deem important to multichannel video offerings, despite the program access provision of the Communications Act of 1934, as amended.

In enacting Section 628, Congress expressed its concern that competitors to incumbent cable operators often face insurmountable hurdles in seeking access to critical programming required to compete. Congress found that cable-affiliated programmers have the "incentive and ability" to favor cable operators over other MVPDs. Through Section 628, Congress sought to break the cable industry's "stranglehold" over programming, which had historically been enforced through exclusivity arrangements and other market power abuses exercised by cable operators and their affiliated programming suppliers that denied programming to competitive technologies, or made programming available on discriminatory terms and conditions.

Even though competitors have made some in-roads, local programming distribution markets remain highly concentrated, and the vertical relationships that dominated the market in 1992 have become further entrenched. Competitors are often denied access to programming services that are unaffiliated with incumbent cable operators, which are not covered by the program access rules. And notwithstanding the program access rules, cable operators still withhold programming that is within the ambit of the rules. Resumption of the "cable-friendly" exclusive arrangements that dominated the industry before the 1992 Cable Act was passed would add to this mix, critical cable-affiliated programming services, which would absolutely stifle new facilities-based entry from the competitive broadband industry.

The Commission must therefore find that the exclusivity prohibition continues to be necessary to preserve competition and diversity in the distribution of video programming, and continue the prohibition in effect, thereby promoting consumer choice and the public interest. The Commission should also take this opportunity to address competitive concerns regarding discriminatory and exclusionary conduct involving cable-affiliated, terrestrially-delivered regional sports programming and other such services, access to which is necessary for new providers to compete effectively.

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	)	
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COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

The Broadband Service Providers Association ("BSPA") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[2] The *NPRM* seeks comment on whether the prohibition on exclusive contracts between cable operators and cable-affiliated programmers contained in the Commission's program access rules adopted pursuant to Section 628 of the Communications Act of 1934, as amended (the "Communications Act"), should cease to be effective pursuant to the sunset provision contained in Section 628(c)(5).[3]

For the reasons set forth below, BSPA believes that the exclusivity prohibition is absolutely critical to competitive entry in the multichannel video programming distribution

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[2] Notice of Proposed Rulemaking, *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, FCC 01-307, CS Docket No. 01-290 (rel. Oct. 18, 2001)("*NPRM*").

[3] *Id*. ¶ 8.

market, and urges the Commission to continue the exclusivity prohibition in effect. In addition, the Commission should take this opportunity to address competitive concerns regarding cable-affiliated regional programming services delivered terrestrially, without access to which, a new provider's ability to compete would be significantly hindered or prevented altogether.

INTRODUCTION AND BACKGROUND

BSPA is an organization of a new breed of last-mile service providers – companies that are building new, facilities-based, advanced, last-mile broadband networks for the delivery of compelling bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country.[4] As such, BSPA's members compete directly with cable operators and other multichannel video programming distributors ("MVPDs"), as well as incumbent and competitive local exchange carriers, and Internet service providers.

BSPA's mission is to promote and support the development of a competitive, facilities-based, broadband industry, which will expand consumer choice and increase infrastructure investment. With over 22 million households already under franchise, over one million current subscribers, and more than 29,000 miles of constructed broadband network, BSPA members represent one of the best opportunities to satisfy expanding demand for competitive residential broadband services. The state-of-the art, fiber-rich technologies and bundled multichannel video

[4] The founding members of BSPA are Altrio Communications, Carolina Broadband, ClearSource, Everest/UtiliCorp United, Gemini Networks, Grande Communications, Knology, RCN Corp., Astound Broadband, Starpower Communications, LLC, Utilicom Networks LLC (d/b/a Sigecom and TOTALink), and Wide Open West. These members have operations in numerous states, including Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, D.C., and Wisconsin. Contact information for each of the founding members is listed in Attachment A, hereto.

offerings of BSPA members will increase competition and the expansion and availability of broadband services across the country.

This proceeding is of significant importance to BSPA members. The provision of high quality content is the cornerstone to its members' bundled, multichannel video offerings. Without such content, any multichannel provider, broadband or otherwise, would be unable to compete.

The deployment of competitive broadband infrastructure clearly has taken center stage at the Commission. Encouraging broadband deployment "has become the central communications policy objective today"[5] and has emerged as the "fundamental priority of the Commission."[6] As the Chairman has recognized, "[i]t is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance many other worthy objectives – such as improving education, and advancing economic opportunity for more Americans."[7]

At the core of the broadband debate is the provision of facilities-based competition through multiple broadband platforms, which has been advanced by Chairman Powell as the "ultimate objective."[8] In fact, the Commission has previously acknowledged that the "most substantial benefits to consumers will be achieved through facilities-based competition"[9] -- competition that is being brought to markets around the country by BSPA members.

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[5] *Remarks of Chairman Michael K. Powell*, Press Conference, Oct. 23, 2001.

[6] *Remarks of Commissioner Kevin J. Martin*, National Summit on Broadband Deployment, Oct. 26, 2001.

[7] *Remarks of Chairman Michael K. Powell*, Press Conference, Oct. 23, 2001.

[8] *Id*.

[9] Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking, *Matter of Promotion of Competitive Networks in Local Telecommunications Market; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 99-141, WT Docket No. 99-217, CC Docket No. 96-98, ¶ 4 (rel. July 7, 1999).

The deployment of new, high-capacity facilities by competitive broadband providers allows for the provision of next-generation, advanced services, which cannot be provided on existing legacy networks. In addition, direct, head-to-head competition from advanced networks leads to significant competitive responses from incumbent providers. As the Commission has found in its *Seventh Annual Cable Report,* where cable operators face, direct head-to-head competition in a given community, they are likely to respond by decreasing prices, increasing channel offerings, improving customer service, and offering new, innovative services.[10] Incumbent providers also respond by upgrading and investing in their own networks to provide advanced services that are competitive with those of the new entrant. Competitive entry therefore brings a second key benefit – the substantial investment dollars associated with the construction of multiple, competing networks.

While the Telecommunications Act of 1996 (the "Act") was enacted with these objectives (among others) in mind – the creation of competition and consumer choice for broadband multichannel video programming services – the full intent of the Act has not yet been realized. Broadband deployment and facilities-based competition have yet to reach ubiquitous levels. One factor that continues to slow competitive entry is ongoing impediments to acquiring programming content that subscribers deem important to multichannel video offerings. Indeed, Chairman Powell has recognized that in the broadband world "*content is king*."[11] This was no

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[10] Seventh Annual Report, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1, CS Docket No. 00-132, ¶¶ 9, 138, 213, 235 (rel. Jan. 8, 2001)("*Seventh Annual Report*").

[11] *Telecommunications Reports*, Nov. 19, 2001 at p. 5 (quoting Chairman Powell speaking at NARUC Conference, Nov. 14, 2001)(emphasis added).

less true when Congress enacted the 1992 Cable Act,[12] and its provisions to facilitate competitive entry into monopoly cable markets.

Key among these is the program access provision – Section 628 of the Communications Act. In enacting Section 628, Congress expressed its concern that competitors to incumbent cable operators often face insurmountable hurdles in seeking access to critical programming required to compete. Congress found that "vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors using other technologies."[13] Through Section 628, Congress sought to break the cable industry's "stranglehold" over programming, which had historically been enforced through exclusivity arrangements and other market power abuses exercised by cable operators and their affiliated programming suppliers that denied programming to competitive technologies, or made programming available on discriminatory terms and conditions.[14] Thus, through the program access provisions, Congress directed the Commission to "address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[15]

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[12] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("*1992 Cable Act").*

[13] 1992 Cable Act, § 2(a)(5).

[14] *See* 138 Cong. Rec. H6540 (daily ed. July 23, 1992)(Rep. Eckart)(cable operators "know that if they maintain their stranglehold on this programming, they can shut down competition – even the deep pockets of the telephone companies for a decade or more."); 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (statement of Rep. Tauzin)("[My] amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs. In effect, this bill says to the cable industry, 'You have to stop what you have been doing, and that is killing off your competition by denying it products.'. . . Programming is the key. . . . Without programming, competitors of cable are . . . stymied . . . What does it mean? It means that cable is jacking the price up on its competitors so high that they can never get off the ground. *In some cases they deny programs completely to those competitors to make sure they cannot sell a full package of services. So the hot shows are controlled by cable*. . . . It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, 'You cannot refuse to deal anymore.'")(emphasis added).

[15] H.R. Conf. Rep. No. 102-862, at 93 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275.

As will be discussed below, even though competitors have made some in-roads, local programming distribution markets remain highly concentrated, and the vertical relationships that dominated the market in 1992 have become further entrenched. Competitors are often denied access to programming services that are unaffiliated with incumbent cable operators, which are not covered by the program access rules. And notwithstanding the program access rules, cable operators still withhold programming that is within the ambit of the rules. Resumption of the "cable-friendly" exclusive arrangements that dominated the industry before the 1992 Cable Act was passed would add to this mix, critical cable-affiliated programming services, which would absolutely stifle new facilities-based entry from the competitive broadband industry.

The Commission must therefore find that the exclusivity prohibition continues to be necessary to preserve competition and diversity in the distribution of video programming, and continue the prohibition in effect, thereby promoting consumer choice and the public interest. The Commission should also take this opportunity to address competitive concerns regarding discriminatory and exclusionary conduct involving cable-affiliated terrestrially-delivered regional sports programming and other such services, access to which is necessary for new providers to compete effectively.

DISCUSSION

I. THE COMMISSION SHOULD EXTEND THE SUNSET DATE OF THE PROHIBITION ON EXCLUSIVE CONTRACTS

A. The MVPD Market Continues to Be Dominated by Cable Operators

As the Commission recently recognized in its *Seventh Annual Report*, incumbent cable operators currently serve 80% of all MVPD subscribers and are still the "dominant" providers of multichannel video programming, with the ten largest multiple system cable operators ("MSOs") serving close to 90% of all subscribers.[16] In fact, only one percent of all cable communities across the country have been certified by the Commission as having "effective competition" as a result of the presence of a direct, head-to-head competitor to the incumbent cable provider, leaving "most consumers [with] limited choices."[17] Furthermore, while direct broadcast satellite ("DBS") providers have gained a greater market share in the last several years (although a substantial portion of this growth has been in markets not served or incapable of being served by cable), other competitive MVPDs have yet to capture a significant share of the market. For example, MMDS, SMATV, and OVS providers together possess less than three percent of the national MVPD marketplace, and broadband Internet video is "still not seen as a direct competitor to traditional video services."[18] These and other telling statistics led the Commission to conclude in the *Seventh Annual Report* that, "the market for the delivery of video programming . . . continues to be highly concentrated and characterized by substantial barriers to entry . . . into a rival's market."[19]

Cable's dominance and corresponding market power are also evidenced by chronic cable price increases, which continue to outpace inflation year after year.[20] In addition, the recent wave of consolidation and "clustering" by MSOs have yet to result in the promised benefits to consumers. Instead, these phenomena have led to even *higher* prices in areas where systems are clustered, with more than 50% of all cable subscribers now being served by clustered systems;[21]

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[16] *Seventh Annual Report*, ¶¶ 5, 15.

[17] *Id*. ¶ 138.

[18] *Id*. ¶¶ 14, 107.

[19] *Id*. ¶ 137.

[20] *Id*. ¶ 9.

[21] *Id*. ¶¶ 155, 15.

and whereas cable programmers once had multiple opportunities to sell their product in a given local market, in the majority of cases, consolidation and clustering have left a single operator with the predominant share of subscribers. In short, cable operators still enjoy overwhelming market dominance in most local markets, and the gradual reduction in their market share since the passage of the 1992 Cable Act has not been sufficient to blunt their ability to inhibit competitive entry.

B. Cable Operators Continue to Control Essential Video Programming Services

Today, more than one-third of all national programming networks are vertically integrated with at least one MSO, with at least one of the top five MSOs holding an ownership interest in one of these programming services.[22] For example, AT&T, the nation's largest cable operator serving over 19% of all MVPD subscribers, has ownership interests in 64 national programming networks, which comprise 23% of all programming services.[23] Moreover, and even more significantly, nine of the top 20 video programming services in terms of subscribership, and 11 of the top 20 services in terms of prime time ratings, are vertically integrated. In addition, as discussed in more detail below, access to sports programming, which has become absolutely essential to compete, is increasingly under the control of cable operators serving clustered, regional areas.[24]

There is little question that, as was the case before passage of the 1992 Cable Act, with elimination of the exclusivity prohibition, competitive providers would be denied access to these

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[22] *Id*. ¶ 174.

[23] *Id*.

[24] *See infra* at II.

programming services. As Congressman Tauzin, one of the principal architects of the 1992 Cable Act and the program access provisions, observed:

> [w]e awakened to the sad realization that we had forgot one crucial element, and that was that *cable controlled programming*. And that *controlling programming was a way of making sure that there would be no competitors*. If a competitor couldn't get the programming, it certainly wasn't going to launch the [system].[25]

Without access to the content required to compete effectively with incumbent operators, no amount of broadband deployment will matter. "Build it and they will come" does not work in the market for multichannel video programming – you also have to give them the game to watch.

C. The Current State of the Marketplace Demands Retention, Not Elimination of the Exclusivity Prohibition

When Section 628 was passed in 1992, Congress was reacting to widespread complaints about the refusal of cable-affiliated programming networks to make their programming available to competitors. Since that time, the exclusivity prohibition has been an important tool for ensuring competitive MVPDs' access to leading programming services controlled by the cable industry. There is no question, given the industry's pattern of conduct, that cable operators can and will use control over programming as a strategic competitive weapon, given the opportunity to do so. Today, cable operators routinely require and obtain exclusivity arrangements with non-vertically integrated programmers, who are not covered by the Section 628(c)(2)(D) exclusivity prohibition. Eliminating the exclusivity prohibition will provide the cable industry with the opportunity to foreclose competitor access to vast amounts of additional critical programming services, thereby stifling competitive entry and the deployment of competitors' advanced broadband networks.

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[25] *Examination of Cable Rates: Hearing Before the Senate Commerce, Transportation and Science Comm.*, 105th Cong. (July 28, 1998)(statement of Rep. Billy Tauzin)(emphasis added).

Indeed, while the statutory ban on exclusive arrangements provides for a waiver if the Commission finds such exclusivity is in the public interest, since its enactment in 1992, the Commission has granted petitions for exclusivity on just *two* occasions, and both were for smaller, regional and local news programming services.[26] In rejecting all other petitions for exclusivity waivers, the Commission in turn rejected many of the pro-exclusivity arguments that vertically integrated programmers and cable operators are likely to offer during this proceeding. The Commission should once again reject these arguments as merely self-serving theory, one that, in practice, actually works to deprive new competitors of critical programming.

Section 628 was created to promote fair competition and to stimulate the development of new technologies, and BSPA members are spending *billions* of dollars to deploy fiber-rich, last mile broadband networks that are capable of serving consumers with these new, state-of-the-art, broadband technologies. However, due to the high up-front costs to build and operate such networks, as well as the difficulty in competing with entrenched monopolists who also control the content to be delivered, few markets have the benefits of significant competitive entry. New entrants, such as broadband providers, are forced to market their services against incumbent cable operators who have substantial advantages in the competitive battle: name recognition, embedded customer base, and strong economies of scale.

To succeed in spite of these formidable obstacles, new entrants must be able to attract a substantial share of existing cable operators' subscribers. To do so requires the ability to offer the basic product desired by subscribers and currently available through the incumbent provider. Without the ability to secure and offer the most popular and the most variety of programming, no

[26] *See New England Cable News*, 9 FCC Rcd 3231 (1994); *NewsChannel*, 10 FCC Rcd 691 (1994).

consumer will be willing to migrate from the current incumbent monopolist – no matter how otherwise compelling the offering might be.

Simply put, consumers care more about content than they do about technology, corporate structure, or abstract theories of competition. Therefore, access to programming is a key component to successful implementation of competitive services. Allowing the exclusivity prohibition to sunset will have dire consequences for the continued entry by broadband, facilities-based providers. The prohibition continues to be absolutely vital "to preserve and protect competition and diversity in the distribution of video programming."[27]

II. THE COMMISSION SHOULD ADDRESS COMPETITIVE CONCERNS REGARDING ACCESS TO TERRESTRIALLY-DELIVERED, CABLE-AFFILIATED PROGRAMMING SERVICES NECESSARY TO COMPETE

As the Commission considers the exclusivity prohibition and the role of the prohibition in eliminating barriers to entry that inhibit competition from non-incumbent MVPDs, it should also take this opportunity to address concerns regarding access to terrestrially-delivered, regional programming services that are affiliated with cable operators. This issue, particularly with respect to cable-affiliated regional sports programming services and other regional services such as local news networks, is critically important to the competitive broadband industry. The availability of regional sports programming, for example, is essential to the provision of a competitive multichannel offering. Increasingly, however, these services are being moved to terrestrial modes of distribution. In finding that the exclusivity prohibition should not sunset with respect to cable-affiliated programming services, the Commission must also ensure that the exclusivity prohibition (and other provisions of the program access rules) continue to apply to critical regional cable-affiliated programming services, regardless of the mode of delivery.

[27] Communications Act, § 628(c)(5).

As discussed more fully below, BSPA believes that, notwithstanding the Commission's historical treatment of terrestrially-delivered, cable-affiliated programming, Section 628(b) provides the Commission with jurisdiction to adopt rules prohibiting refusals to deal and other discriminatory conduct with respect to terrestrially-delivered, cable-affiliated programming services, without which, a providers' ability to compete would be significantly hindered or prevented altogether.[28] BSPA urges the Commission in the context of this (or a separate proceeding if the Commission deems it more appropriate) to reexamine its jurisdiction to address competitive abuses under Section 628 with respect to such terrestrially-delivered programming. Alternatively, to the extent that the Commission is unable to conclude that its jurisdiction reaches such conduct, then it should affirmatively recommend to Congress that Section 628 be amended to provide it with the requisite authority.

Historically, the Commission has taken the view that competitive providers cannot bring discrimination and exclusivity claims under the existing program access rules adopted pursuant to Section 628(c), for refusals to deal and exclusive dealing arrangements involving terrestrially-delivered programming affiliated with incumbent providers.[29] The Commission has indicated,

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[28] *See Id.,* § 628(b).

[29] *See, e.g.,* Memorandum Opinion and Order, *RCN Telecom Serv. of N.Y., Inc. v. Cablevision Sys. Corp.,* FCC 01-127, ¶ 4 (rel. May 30, 2001)("*RCN*") (refusal to provide terrestrially delivered programming to a competitor is outside the anti-discrimination provision of Section 628(c), which explicitly prohibits discrimination "in the prices, terms, and conditions of sale of or delivery of satellite cable programming . . ."). Section 628(b) is the operative program access prohibition, making it unlawful for a cable operator or a vertically integrated "satellite cable programming vendor" to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming . . . to subscribers or consumers." Section 628(c)(1) directs the Commission to prescribe regulations specifying the particular conduct that is prohibited by Section 628(b) "in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies." Subsection 628(c)(2) specifies the "*minimum contents*" of such regulations. (emphasis added). The Commission's discrimination and exclusive dealing regulations adopted pursuant to Section 628(c), listing specific prohibited conduct under Section 628(b), essentially repeat almost verbatim the Section 628(c)(2) minimum prohibitions and their focus on discrimination and exclusive dealing arrangements involving the sale of satellite delivered programming to competing providers. *See generally* 47 C.F.R. § 76.1002.

however, that “there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming.”[30] It has yet to find a case, however, where the migration to terrestrial delivery was for the purpose of evading the Commission’s rules, and hence an unfair method of competition or practice or for the purpose of preventing distribution of a satellite programming service.[31]

This issue, particularly with respect to cable-affiliated regional sports programming services and other regional services such as local news networks, has become critically important to the competitive broadband industry. As the Commission recognizes in the *NPRM*, “‘certain programming services may be more essential than others to the viability and success of competing program distributors.’”[32] Regional sports programming services that telecast local professional league games, for example, are such an essential programming service.

In the *Fifth Annual Cable Report*, the Commission observed that “[s]ports programming . . . warrants special mention because of its widespread appeal and strategic significance for MVPDs.”[33] And in a report released last year, GAO likewise characterized sports programming as “marquee programming” because of its attractiveness to cable viewers.[34] In addition, sports

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[30] *RCN,* ¶ 15.

[31] It appears that a terrestrial migration complaint will be denied if the cable operator can show that there were legitimate and significant cost savings and efficiencies associated with the move, a relatively low threshold for operators to meet.

[32] *NPRM*, ¶ 14 (quoting Report, *Matter of Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service,* 5 FCC Rcd 4962, 5027 (1990)).

[33] Fifth Annual Report, *Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* 13 FCC Rcd 24284, ¶ 171 (1998)(“*Fifth Annual Report*”).

[34] *Impact of Sports Programming Costs on Cable Television Rates*, GAO/RCED-99-136 at 3 (June 1999). *See also* Piraino, *A Proposal For the Antitrust Regulation of Professional Sports*, 79 B.U.L. Rev. 889, 892 (1999)(access to sports programming is “critical to any cable system’s success”)(footnotes omitted)(“*Piraino*”).

programming is unique, and cannot be duplicated by competing MVPDs through vertical integration into program supply, even if the cost of doing so were not a barrier in and of itself.

The importance of sports programming was shown in comments to the Commission by BSPA member RCN, reported in the *Sixth Annual Cable Report*.[35] According to a survey of cable subscribers conducted for RCN, approximately 40% to 58% of cable subscribers indicated that they would be less likely to subscribe to cable service if it lacked local sports programming. The implication of this survey is that on average only 51% of subscribers in a market would even be available to a service that failed to carry local sports programming. Cutting in half the overall market opportunity for a broadband provider would potentially yield overall penetration rates that are so low that investment in that market would be uneconomic.[36] Thus to the extent competitors are denied access to regional sports programming, their ability to enter the market and provide multichannel video programming, including satellite delivered programming, to consumers would be "significantly hindered" or "prevented" outright.[37]

As was the case with satellite delivered programming generally prior to the passage of the 1992 Cable Act, today cable MSOs in markets throughout the country possess a "stranglehold" over critically important regional sports programming. As the Commission indicated in its *Seventh Annual Report*, cable MSOs are affiliated with regional sports services in numerous markets, including New England, New York, Philadelphia, Baltimore/Washington, Cincinnati, Chicago, and Florida.[38] In many of these same markets, the MSOs also operate significant

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[35] Sixth Annual Report, *Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* 15 FCC Rcd 978, ¶ 184 n.650 (2000)("*Sixth Annual Report*").

[36] Assuming, for example, a penetration rate of even 30%, the competitor would only obtain a 15% overall penetration.

[37] *See* Communications Act, § 628(b).

[38] *Seventh Annual Report,* Table D-3.

regional clusters that compete with competitive broadband providers.[39]

Given the Commission's existing program access rules, adopted pursuant to Section 628(c)(1) and its construction of Section 628(b), cable operators have significant freedom, with the thinnest of justifications, to move affiliated satellite programming services to terrestrial delivery, and thereby avoid application of the rules' prohibition on discrimination and exclusive contracts. As Congress found in 1992 in enacting the program access rules with respect to cable-affiliated programming services in general, such cable-affiliated sports programming services have the very same "incentive" to favor their affiliated cable operators over programming distributors using other technologies.[40] Given the absence of the program access limitations, cable operators now have not only the incentive *but the ability* to use their control over sports and other regional programming, to foreclose competitive entry from competing distributors. The threat here is far from insignificant or illusory, but is palpable and real.[41]

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[39] For example, Cablevision, one of the nation's ten largest MSOs, has an extensive regional cluster in the New York metropolitan area, providing MVPD service to approximately 2.7 million subscribers in the region. According to the Commission, Cablevision owns a majority interest in Rainbow Media Holdings, which in turns owns a controlling interest in the entity which ultimately owns and controls Madison Square Garden Network ("MSG") and Fox Sports Net – New York ("Fox Sports/NY). MSG and Fox Sports/NY are satellite delivered programming services operating in the New York metro area that own the rights to televise professional sports events of New York area teams in the National Basketball Association (the Knicks and Nets), the National Hockey League (the Rangers, Islanders and Devils), and Major League Baseball (the Yankees and Mets). *RCN*, *supra.* In addition, Comcast, the nation's third largest MSO with over 8 million subscribers, has assembled a mid-Atlantic "super cluster" along the corridor from Baltimore and Washington, through Wilmington and Philadelphia, and into central New Jersey. Comcast reportedly has 2 million subscribers in the Philadelphia metropolitan area. According to the Commission, Comcast-Spectacor, 66% owned by Comcast, owns the NBA (Philadelphia 76ers) and NHL (Philadelphia Flyers) franchises in Philadelphia. In 1996, Comcast-Spectacor and the Philadelphia Phillies formed a joint venture to create SportsNet, which now holds the rights to televise most 76ers, Phillies, and Flyers games in the Philadelphia market. *See* Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corp et al; EchoStar Comm. Corp. v. Comcast Corp. et al., Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, FCC 00-404 (rel. Nov. 20, 2000)("*DirecTV/EchoStar*").

[40] 1992 Cable Act, § 2(a)(5).

[41] In 1998, in denying a Petition for Rulemaking of Ameritech New Media to impose rules under Section 628 governing the movement of programming from satellite to terrestrial delivery, the Commission nonetheless indicated its belief that "the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace." Report and Order, *Matter of Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage,* 13 FCC Rcd 15822, ¶ 71 (1998) ("*Ameritech*"). And in last year's

As discussed above, in New York and Philadelphia, the incumbent cable operator has established a strong local cluster, has acquired a controlling interest in the regional sports network with distribution rights to local professional sports, and has moved distribution of sports programming previously distributed by satellite to a terrestrial network. Fiber-based networks now deliver local cable programming in other markets across the country, including Chicago, Boston, Indianapolis, Minneapolis, Orlando, Columbus, and Kansas City.[42] Furthermore, given the amount of dark fiber that exists today, economic efficiencies dictate that it is likely that in the future even more regional programming will be delivered terrestrially over these fiber networks.

The Commission's decision on review in the consolidated *DirecTV* and *EchoStar* cases against Comcast, essentially suggests that aggregating all of the transmission rights to virtually every local professional sporting event in a metro area with the clear intent of eliminating DBS access to previously satellite delivered regional sports programming is not an unfair practice.[43] The Commission's decision references Comcast's representations that, apart from its refusal to distribute SportsNet to DBS providers, it still deals with all other competing MVPDs in the area.[44] At the same time, the Commission is silent as to what claim or remedy competing providers might have, should Comcast decide at some future point, for whatever reason, to discontinue providing this or any other critical terrestrially-delivered service to competitors, or to

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Seventh Annual Report, the Commission again recognized that "the terrestrial distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace." *Seventh Annual Report*, ¶ 15. In both cases, the Commission committed to monitor the issue and its impact on competition. *Id.; Ameritech*, ¶ 71.

[42] *See* WCA Comments at 4 in Docket No. 01-129.

[43] *See DirecTV/EchoStar*, *supra*.

[44] *See id.*

do so on discriminatory terms and conditions.[45] As one analyst has noted, "[i]f you want to see these teams on the tube in Philly, you need Comcast."[46]

The same, of course, can be said in New York and other markets. Even where cable-controlled sports programming is today delivered by satellite, as discussed above, the Commission has set an extremely high bar for challenging migration to terrestrial distribution as unfair competition under Section 628(b). As one commentator has noted about New York (in a comment that is equally apt in markets throughout the country), through exclusive arrangements such as that of Cablevision and New York professional sports teams, "the Yankees have allowed Cablevision to preclude potential competitors from entering the New York cable market."[47]

The bottom line is that critically important regional sports programming and other regional programming services are being distributed terrestrially in key markets. There is no question regarding the incentive and ability *today* of cable operators to use their control over this programming to engage in predatory conduct; they already have.

The question for the Commission, then, should not be *whether* to address this issue, but *how*. BSPA recognizes, of course, that the Commission has historically been reluctant to directly address the issue of cable-affiliated, regional programming services distributed via terrestrial

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[45] In this regard, RCN has provided in its comments for the *Seventh Annual Report* examples of anticompetitive strategic conduct, short of an actual refusal to deal by Comcast, involving its control over SportsNet. According to RCN, Comcast was initially unwilling to provide it with access to SportsNet to distribute on their system which competes with Comcast, and eventually only agreed to a short term agreement. *See* RCN Corporation Comments at 18-23 in CS Docket No. 00-132. Until recently, Comcast had refused to enter into a multi-year, industry-standard contract for local sports programming in Philadelphia, but had kept RCN on a revolving three-month renewal. That left RCN in a tenuous position as it sought to persuade existing Comcast subscribers to try the newcomer: while RCN had the SportsNet programming, it could not provide assurances that it would continue to have such programming over the long run. *Id*.

[46] Business Week Online, June 1, 2001, Why Comcast Leads the Pack (available at http://www.businessweek.com/bwdaily/dnflash/may2001/nf2001061_141.htm)

[47] *Piraino* at 892.

fiber and microwave networks under its program access rules. Much of the resistance of the Commission to claims challenging conduct involving terrestrially-delivered programming has been in the context of specific program access complaints brought under the "minimum contents of regulations" in Section 628(c)(2). As discussed above, that provision, which focuses on conduct involving satellite delivered programming, formed the basis for the discrimination and exclusive dealing provisions of the Commission's program access rules.[48] At the same time, the focus of the applicability of Section 628(b) to terrestrially-delivered, regional programming, whether in rulemakings, cable competition reports, or program access complaints, has been on the migration to terrestrial distribution to evade application of the program access rules as an unfair act, not the underlying refusal to deal that prevents a competing MVPD from gaining access to programming, without which its ability to compete would be significantly hindered or prevented altogether.[49]

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[48] As the Commission has recognized, however, the "minimum contents of regulations" contained in Section 628(c)(2) should *not* be viewed as an expression of the limits of the Commission's jurisdiction under Section 628. *See* Second Report and Order, *Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems,* 11 FCC Rcd 18223, ¶ 186 (1996)("*Second OVS Report and Order*")(citations omitted)(Section 628(b) authorizes the Commission "to adopt additional rules to accomplish the program access statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."); Third Report and Order and Second Order on Reconsideration, *Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems,* 11 FCC Rcd 20227, ¶ 169 (1996)("*Third Report and Order*")(Section 628(b) is "clear repository of Commission jurisdiction" to address new obstacles and by entitling section "Minimum Contents of Regulations," Congress gave Commission authority to adopt additional rules that will advance the purposes of Section 628; "it did not limit the Commission to adopting rules only as set forth in that statutory provision"). The *Second Report and Order* and *Third Report and Order* were consolidated on appeal to the Fifth Circuit and affirmed in part, reversed in part, and remanded, on other grounds. *See City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

[49] Indeed, BSPA does not challenge a cable operator's legitimate business decision to migrate regional programming to terrestrial systems given cost savings and efficiencies that may flow from the use of capacity in existing fiber and microwave networks. While in certain cases the movement of programming might be to evade the program access rules as currently drafted, the migration of programming should not be the focus of those rules, as much as discriminatory and exclusionary conduct with respect to the programming itself. Thus, the Commission's concern in *Ameritech* that the "impos[ition of] detailed rules on the movement of programming from satellite delivery to terrestrial delivery . . . would unnecessarily inject the Commission into the day-to-day business decisions of . . . programmers" would not be of concern here. *Ameritech,* ¶ 71.

We think the time is right for the Commission to reexamine its jurisdiction under Section 628(b), whether in this or a separate proceeding, to determine *explicitly* whether Section 628(b) gives the Commission jurisdiction to prohibit refusals to deal and other discriminatory conduct involving essential or critical programming owned by cable operators, whether such programming is distributed by satellite or by terrestrial technology. There is no dispute that refusals to deal and other discriminatory conduct can constitute unfair competition or unfair acts or practices for purposes of Section 628(b).[50] So long as the refusal to deal or other discriminatory conduct involves programming that, if denied, would "hinder significantly or prevent" a competitive MVPD from entering and providing programming to subscribers, we would think that the Commission would be within its jurisdiction to consider or adopt rules under Section 628(c)(1) specifying such conduct as being prohibited under Section 628(b).[51] Alternatively, to the extent that the Commission is unable to conclude that its jurisdiction reaches such conduct, then it should affirmatively recommend to Congress that Section 628 be amended to provide it with the requisite authority.

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[50] In the *Program Access Report and Order* the Commission recognized that among the types of discrimination covered by Section 628(c)(2)(B) are forms of non-price discrimination such as a vendor's "'unreasonable refusal to sell' or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." First Report and Order, *Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, ¶ 116 (1993).

[51] In its comments on Ameritech New Media's program access rulemaking petition, NCTA essentially urged the same construction of Section 628(b). *See Ameritech,* ¶ 67 ("NCTA asserts that the test [under Section 628(b)] is not whether the denial of a particular programming service to an MVPD significantly hinders or prevents the MVPD from providing that programming service. The test is whether the unavailability of a service has a significant adverse effect on the ability to compete in the provision of video programming to subscribers or consumers.").

CONCLUSION

For all the foregoing reasons, the Commission should extend the sunset date of the prohibition on exclusive contracts as such prohibition is necessary to preserve competition and diversity in the national MVPD marketplace. The statutory limits on exclusivity are vital to new entrants, and the Commission would be gravely threatening broadband competition if it allowed the prohibition to lapse. In addition, the Commission should take this opportunity to address competitive concerns regarding discriminatory and exclusionary conduct involving sports and other cable-affiliated, terrestrially-delivered, regional programming services, without access to which, a new provider's ability to compete would be significantly hindered or prevented altogether.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2001, a copy of the foregoing Comments was served by hand, on each of the persons listed on the attached service list.

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